1949

Jefferson's Wall of Separation: What and Where

Edward F. Waite

JEFFERSON'S "WALL OF SEPARATION": WHAT AND WHERE?

By EDWARD F. WAITE*

WHEN the thoughtful layman of a certain bent of mind knows that the Supreme Court of the United States has unanimously declared that "this is a Christian nation" and has never taken it back; and when he sees on his coins "In God We Trust," notes that Thanksgiving Day is a national holiday, observes that sessions of each House of Congress are opened with prayer, is advised that there is compulsory church attendance at West Point and the Annapolis Naval Academy, and recalls the ministrations of his army or navy chaplain (paid from public funds), it gives him a shock to be told that the same Court recently seems to have placed the ban of unconstitutionality on the familiar practice of teaching religion to public school children in "released time."

The layman of a somewhat different mental attitude happens to know that the Court has expressly approved Jefferson's famous saying that the First Amendment "built a wall of separation between church and state"; and when he learns that two years ago the same august tribunal upheld a New Jersey law, as not repugnant to the Federal Constitution, which repaid to parents out of public moneys sums they had spent to send their children to parochial schools, he too is astonished. Even the lawyer, when he reads the two most recent decisions and the accompanying dissents,[1] wonders how to reconcile both cases with both of the sounding phrases which had been approved by the Court. If his attention has ever been called to it, he is likely to think of Mr. Justice Holmes' pithy sentence: "It is one of the misfortunes of the law that ideas become encysted in phrases, and thereafter for a long time cease to provoke further analysis."[2]

In what sense, if at all, is this "a Christian nation"? Is there "a wall of separation between church and state," and if so, where is it, and what really does it separate? The words "church" and "Christian," do not occur in the Constitution, and "religion" only in Art. VI, which forbids a "religious test" for any office or

*Judge of the District Court, 4th Judicial District of Minnesota, 1911-1941 (retired).

1. Everson v. Board of Education of the Township of Ewing, 330 U. S. 1 (1947); People of State of Illinois *ex rel.* McCollum v. Board of Education of School District No. 71, 333 U. S. 203 (1948).

2. Hyde v. United States, 225 U. S. 347 (1912) (dissenting opinion).

public trust under the United States, and in the First Amendment, which consists of six prohibitions of legislation by Congress in denial of or interference with certain important human rights. We are here concerned with the first two, which are as follows:

1. "Congress shall make no law respecting an establishment of religion."
2. Congress shall make no law prohibiting the free exercise of religion.[3]

As one reflects upon these sentences his mind is crowded with questions, none of which will the writer undertake to answer. He proposes to himself only the modest—but he hopes useful—task of showing what questions have been considered and what answers given in decided cases where these two prohibitions have come for interpretation before the final authority,—the Supreme Court of the United States. Members of the Court have often reviewed the conditions, events and discussions leading up to the adoption of the First Amendment, not always agreeing as to what Madison, Jefferson and the First Congress really meant. These historical reviews are not within the scope of this study. We take the amendment as we find it: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." What meaning, before the two recent decisions, did the Court give to these carefully chosen words?

To some it may perhaps be a matter of surprise to know that the earliest express construction of either prohibition by the Supreme Court occurred nearly a century after it was framed, in *Reynolds v. U. S.*,[4] decided in 1878. Before this, however, there were several cases in which the relation of government to religion was referred to in terms which may be claimed to be relevant to later decisions. The first was *Terrett v. Taylor*,[5] in 1815. While the Protestant Episcopal Church was the established church of Colonial Virginia certain legislative acts provided for its incorporation and tenure of property. These were repealed after the adoption of the Federal Constitution. The controversy concerned property claimed by an incorporated church, then within the District of Columbia, on the one hand, and representatives of the State of Virginia on the other. The Court was called upon to construe the constitution and laws of Virginia and not the Federal Constitution. In deciding

3. The other prohibitions forbid laws abridging freedom of speech, of the press, of the right of the people peaceably to assemble, and of the right to petition the government for a redress of grievances.

4. 98 U. S. 148 (1878).

5. 9 Cranch. 43 (1815).

the case Mr. Justice Story, speaking for the Court, used the following language, though clearly indicating that this did not cover the effective reasons for its decision:

"Although it may be true that religion can be directed only by reason and conviction, not by force or violence, and that all men are equally entitled to the free exercise of religion according to the dictates of conscience, as the bill of rights of Virginia declares, yet it is difficult to perceive how it follows as a consequence that the legislature may not enact laws more effectually to enable all sects to accomplish the great objects of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as their spiritual concerns. . . . The free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties. . . ."[6]

The Girard Will case[7] is sometimes carelessly cited as though it declared that the United States is a Christian nation. Such is not the fact—it merely conceded *arguendo* that Christianity was a part of the common law of Pennsylvania "in this qualified sense, that its divine origin and truth are admitted"; and interpreting the state constitution[8] Mr. Justice Story for the Court declared—"Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels."[9] In response to the contention that the foundation of the college upon the principles and exclusions prescribed by the testator[10] was "derogatory and hostile to the Christian religion, and so was void as being against the common law and public policy of Pennsylvania," the Court said: "Why may not the Bible, and

6. *Id.* at 48.

7. Vidal v. Girard's Executors, 2 How. 126 (1844).

8. Quoted by the Court as follows: "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishment or modes of worship." (*Id.* at 198.)

9. *Ibid.*

10. The testator had provided that "no ecclesiastic, missionary or minister of any sect whatsoever" should ever have any part in the administration of the college, or be admitted to the premises. It was explained, however, that this was not intended "to cast any reflection upon any sect or person," but to preserve the pupils from sectarian controversies. All teachers were desired "to instill into the minds of the scholars the purest principles of morality, so that on their entrance into active life they may, from inclination and habit, evince benevolence toward their fellow creatures, and a love of truth, sobriety and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer."

especially the New Testament, without note or comment, be read and taught (but by laymen only) as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay teachers? Certainly there is nothing in the Will that proscribes such studies."[11] It should be borne in mind that this language construed only the constitution of Pennsylvania and the terms of the Girard will, and had no reference to the Federal Constitution. In the same term of Court in which the *Girard Will* case was decided, the Court had before it a case arising under a municipal ordinance. Counsel sought to present a federal question under the First Amendment, but the Court dismissed the proceeding for the reason that "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws."[12]

Watson v. Jones[13] was a dispute between warring factions of a Presbyterian church in Louisville, Ky., involving a question as to which party constituted the church organization. It was held that the decision of the governing body of the denomination was binding upon legal tribunals. The First Amendment was not directly invoked; but the Court in an opinion by Justice Miller, used the following language:

"In this country the full and free right to entertain any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create the tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations and officers within the association, is unquestioned."[14]

In the *Reynolds* case,[15] referred to above as the first avowedly to interpret the First Amendment, an indictment for bigamy committed in the Territory of Utah was challenged on the ground that it violated the right of the defendant to pursue his religious belief. The Court, speaking by Chief Justice Waite, said:

11. *Id.* at 200.
12. Permoli v. City of New Orleans, 3 How. 589, 609 (1845).
13. 13 Wall. 699 (1871).
14. *Id.* at 728.
15. Reynolds v. United States, 98 U. S. 148 (1878).

"The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious liberty which has been guaranteed?"[16]

Following a brief historical review the Court quotes the following comment of Thomas Jefferson after the adoption of the Amendment:

"Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State."[17] The Court continues:

"Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the Amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[18]

Plural marriage was declared to be essentially an offense against society, not to be tolerated in the name of religion. The statute was sustained and the conviction affirmed.

Next came *Davis v. Beason*.[19] A statute of the Territory of Idaho which denied to polygamists the right to vote was attacked as violative respectively of Article 6 of the Federal Constitution and of the First and Fourteenth Amendments. The opinion of Justice Field does not discuss Article 6 or the Fourteenth Amendment, but goes more into detail in interpreting the First Amendment than does the *Reynolds* case:

"The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishing of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions re-

16. *Id.* at 162.
17. *Id.* at 164.
18. *Id.* at 164.
19. 133 U. S. 333 (1889).

specting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. . . . It was never intended, or supposed, that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. . . . However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."[20]

It should be noted that in this case the criminal charge before the Court was again, as in the *Reynolds* case, an act and not merely a belief or "religious" connection, the defendant being charged with conspiracy to procure the registration as voters of members of the Mormon Church, contrary to an Idaho law.

The *Reynolds* and *Davis* cases establish the principle that the religious liberty secured by the second prohibition of the First Amendment is subject to the inherent authority of Congress (and under the 14th Amendment and later decisions, the states) to legislate within the limits of the police power for the general welfare. This is all that was decided. Jefferson's words were regarded by the Court as envisioning protection of opinion and of modes of worship not subversive of public order or private rights, and not anti-social action in the name of opinion; and to this extent they were adopted.

Jefferson's phrase also has obvious application to the first prohibition of the Amendment: and here, perhaps, some question arises. Did the Court in approving it in the *Reynolds* case, consider that "church" meant "religion" as defined in the *Davis* case, or *organized* religion,—i.e., sects and denominations, of which latter meaning it is plainly susceptible? The writer has not found the phrase quoted in any Supreme Court decision until *Everson*.[21] There it is used by the majority in support of the statement, made rather as a concession than in support of the conclusion reached, that "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa."[22] In the *McCollum* case[23] it is evident that the "wall of separation" was well to the fore in the minds of

20. *Id.* at 342, 343.
21. Everson v. Board of Education, 330 U. S. 1 (1947).
22. *Id.* at 16.
23. People of State of Illinois *ex rel.* McCollum v. Board of Education, 333 U. S. 203 (1948).

all the members of the Court, with differing views as to what and where it is.

The Supreme Court made its first and only pronouncement that "this is a Christian nation," in *Church of the Holy Trinity v. U. S.*[24] Trinity Church, New York, brought a minister from England under contract that he should become its rector. There was an Act of Congress entitled "An Act to Prohibit the Importation and Migration of Foreigners and Aliens under Contract or Agreement to Perform Labor in the United States, its Territories and the District of Columbia." The first section of the Act made it unlawful "for any person . . . or corporation . . . to . . . in any way assist or encourage the importation or migration of any alien . . . to the United States . . . under contract or agreement . . . to perform labor or services of any kind in the United States. . . ." In the 5th section domestic and various kinds of professional service were excepted, but none of the express exceptions covered pastoral duties. The Department of Justice prosecuted the church officials and a penalty of $1,000 was assessed. After applying familiar rules for the interpretation of statutes the Court, by Justice Brewer, concluded: "We find, therefore, that the title of the Act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the Committee of each house, all concur that the intent of Congress was simply to stay the influx of this cheap unskilled labor."[25] It would seem that when this point was reached a reversal might have been ordered; but the Court went on to say: "But beyond all these matters no purpose of action against religion can be imputed to any legislation, State or Nation, because this is a religious people."[26] Many instances are cited of the recognition of Christianity in connection with the settlement of the colonies, the establishment of the federal government and the founding of several states. It then proceeds: "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation."[27] Various common practices which recognize Deity are mentioned, with the comment: "These and many other matters which might be noticed add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."[28]

24. 143 U. S. 457 (1892).
25. *Id.* at 465.
26. *Ibid.*
27. *Id.* at 470.
28. *Id.* at 471.

One can hardly read this case without deep sympathy for the Court which had been driven into such a desperate corner by Congress and the lower court. It was one of the "hard cases" which have been said to "make bad law." Certainly it would be bad law if the word "nation" must be taken to mean organized government, as it often does, and if government discrimination between "Christian" and non-Christian is implied. But such was not the intention of the Court. Justice Brewer had in mind the prevailing attitude of the people of the United States toward religion as a relevant fact to be taken into account in construing the statute under consideration. The writer has not been able to find any Supreme Court case in which the phrase "This is a Christian nation" has been quoted. In the majority opinion in *U. S. v. Mackintosh*[29] Justice Sutherland said, citing the *Trinity Church* decision: "We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God."[30] Here the issue involved the construction of a statutory oath and the language of the Court merely recognized a relevant state of public sentiment.

Bradfield v. Roberts[31] was the first case in which a direct issue was sought to be raised under the "establishment of religion" prohibition. It was a suit in equity in the District of Columbia brought by a taxpayer to enjoin the payment of public moneys to Providence Hospital, under a contract, for certain additions to its plant. The hospital was incorporated "for the care of such sick and invalid persons as may place themselves under the treatment and care of the said corporation," there being no other limitation of beneficiaries. The bill alleged that the hospital was incorporated by persons who were members of a Catholic order, and conducted under its auspices; that this made it a sectarian institution and that the appropriation of public funds for its use was contrary to the First Amendment. A demurrer on the ground that the bill did not state a cause of action was sustained. The Court said (Peckham, J.): "Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics . . . is not of the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman

29. 283 U. S. 605 (1931).
30. *Id.* at 625.
31. 175 U. S. 291 (1899).

Catholic Church."[32] The point decided was that the bill did not show on its face that the corporation was a religious or sectarian body.[33] The only reference by the Court to this case on a constitutional point prior to the *Everson* case occurred in *Quick Bear v. Leupp*.[34] That involved the payment by the Federal Government to Indians of the Sioux tribe of their own funds, held in trust, for the education of Indians in schools (Catholic) of their own choice. The Court, speaking by Chief Justice Fuller, said: "It is not contended that it is unconstitutional and it could not be,"[35] (citing *Bradfield v. Roberts*). Later in the opinion he said: "We cannot concede the proposition that the Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof." The payment was attacked under Acts of Congress declaring the policy that the government shall make "no appropriation whatever for education in any sectarian school"; and the Court quoted with approval the declaration of the Court of Appeals of the District of Columbia that "it seems inconceivable that Congress shall have intended to prohibit them from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion among the Indians."[36]

The next instance of attempted reliance upon the First Amendment in an attack upon legislation (in this instance an Act of Congress) was in *Arver v. U. S.*[37] The Act in question was the Selective Draft Act of 1917, and it was contended that its exemption of certain classes of persons by reason of their religious calling or belief rendered it unconstitutional. This claim was summarily dismissed by the Court as follows: "We pass without anything but statement the proposition that an establishment of religion or

32. *Id.* at 298

33. Immediately after this case arose Congress enacted a statute declaring it to be "the policy of the government of the United States to make no appropriation of money or property for the purpose of founding, maintaining or aiding by payment for services, expenses, or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control." 29 Stat. 411 (1896). Justice Rutledge, in his dissenting opinion in the Everson case, refers to this case as "an instance of highly artificial grounding to support a decision sustaining an appropriation for the care of indigent patients pursuant to a contract with a private hospital." *Id.* at 43.

34. 210 U. S. 50 (1908).

35. *Id.* at 81.

36. *Id.* at 82.

37. 245 U. S. 366 (1918).

an interference with the free exercise thereof, repugnant to the First Amendment, resulted from the exemption clauses of the act . . . . because we think its unsoundness is too apparent to require us to do more.[38]

Before the "religious liberty" provisions of the First Amendment were again before the Court, the "due process" clause of the Fourteenth Amendment began to be invoked in cases which involved the public schools. It seems appropriate to consider them, since this study has been inspired by recent cases of that sort. *Meyer v. Nebraska*[39] and *Bartels v. Iowa*[40] were decided the same day in 1923. In each a state law forbade the teaching of any foreign language to public school pupils below a certain grade, and a teacher was prosecuted for violating this law. In declaring the Nebraska statute unconstitutional the Court, by Justice McReynolds, said: "The problem for our determination is whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed . . . by the Fourteenth Amendment. 'No state . . . shall deprive any person of life, liberty or property without due process of law.'" The term "liberty," it was held, "denotes . . . the right of the individual . . . to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action without reasonable relation to some purpose within the competency of the state to effect."[41] The statute was an attempt by the legislature "materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own children," and was "without reasonable relation to any end within the competency of the state."[42] Justices Holmes and Sutherland dissented without opinion. In *Bartels* Justice Holmes wrote a brief dissenting opinion (Sutherland, J., again joining) in which, true to his characteristic disposition to give to the state the benefit of any doubt as to the reasonableness of "general welfare" legisla-

38. *Id.* at 390.
39. 262 U. S. 390 (1923).
40. 262 U. S. 404 (1923).
41. 262 U. S. 390, 400 (1923).
42. 262 U. S. 390, 401, 403 (1923).

tion, he expressed the view that the provision in question was not so plainly arbitrary as to be invalid.[43]

Pierce v. Society of Sisters of Holy Names,[44] a hard-fought and important case (heard with *Pierce v. Hill Military Academy*) was an appeal by the Governor of Oregon from a U. S. District Court decree enjoining the threatened enforcement of a compulsory public school attendance law which (with minor exceptions not relevant here) applied to all primary schools. One of the appellees was a Catholic sisterhood incorporated for the education of youth, and owning and operating schools in which religious instruction was given according to the Roman Catholic faith. The other was a privately owned and conducted military academy. The Court, by Justice McReynolds, said that "the inevitable practical result of enforcing the Act . . . would be destruction of appellees' primary schools," and that "there are no peculiar circumstances or present emergencies which demand extraordinary measures relating to primary education."[45] Following *Meyer v. Nebraska* it is held that the Act "unreasonably interferes with the liberty of parents and guardians to direct the unbringing of children under their control,"[46] and tends to destroy the property of both appellees. The decrees below were affirmed, and it is now settled that compulsory school attendance laws must permit attendance at parochial and private schools which meet public school standards. The *Meyer, Bartels,* and *Pierce* cases were cited and approved in *Farrington v. Tokushigi.*[47] This was another case involving the teaching of a foreign language in the public schools—this time Japanese in Hawaii—and it was held that "those fundamental rights of the individual which" those cases "declared were protected from infringement by the states, are guaranteed by the 5th Amendment against action by the territorial legislature or officers."[48]

Cochran v. State Bd. of Education[49] presents one of those instances where the effect on judicial doctrine and legislative policy is open to the suspicion of having gone quite beyond what is found to be warranted when the case is critically examined. An Act of the Louisiana legislature provided that certain tax funds, and appropriations as required by the state constitution, should be

43. 262 U. S. 404, 412 (1923).
44. 268 U. S. 510 (1925).
45. *Id.* at 535.
46. *Id.* at 534.
47. 273 U. S. 284 (1927).
48. *Id.* at 299.
49. 281 U. S. 370 (1930).

devoted "first, to supplying school books to the school children of the state," and the Board of Education was directed to provide "school books for school children free of cost." The title of the appropriation Act for 1928 purported to make appropriations "for public schools." On appeal of taxpayers to the U. S. Supreme Court from a decision of the state supreme court denying an injunction, it was argued that as construed by the majority the purpose and effect of this legislation was to aid private, religious and other schools not embraced in the public educational system of the state by furnishing text books free to the children attending them, and that thus construed it took private property for a private purpose, contrary to the due process clause of the Fourteenth Amendment. In the state court a minority vigorously contended that there was a violation of the provision of the state constitution forbidding public funds to sectarian or private schools. The Supreme Court adopted the interpretation the Louisiana supreme court had taken of the legislation,[50] and which is quoted as follows in the prevailing opinion:[51]

"One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. . . . What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected adapted to religious instruction." The case was then summarily disposed of in the following language:

50. Borden v. Louisiana State Board of Education, 168 La. 1005, 1020, 123 So. 655, 660 (1929).

51. 281 U. S. 370, 374 (1930).

"Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded."[52]

This case has been referred to as "opening the door" to the appropriation of public funds for sectarian schools. It was decided under the due process clause of the Fourteenth Amendment and shows how far the Court was willing to go in 1930 in following, wherever possible, the settled policy of upholding the highest court of a state in its interpretation of a state statute, and accepting its view as to what constitutes a public purpose in connection with state taxes. Is not its authority as a precedent limited to the declaration that state legislation which has been construed by the highest court of the state to be of the character described by the Chief Justice is not *on its face* a taking of private property for private use without due process of law? While the Louisiana court's distinction between aiding all school children and aiding schools which the children attend has been followed in some states and rejected in others,[53] it is noteworthy that this case was not cited by the Supreme Court until *Everson*[54] except in *Carmichael v. So. Coal and Coke Co.*,[55] where a tax law was under attack as not serving a public purpose.

Other phases of the relation between public education and religion were before the Supreme Court in *Hamilton v. University of California*[56] and the *Flag Salute* cases.[57] The former was a case of "conscientious objectors," students at the University of California, who appealed from an order of the Regents, which the Court held to be action by the state, requiring all students to receive military instruction. This, the appellants claimed, was contrary to their religious beliefs and an infringement upon their constitutional liberty. An adverse decision of the California su-

52. 281 U. S. 370, 375 (1930).

53. Citations from the state courts may be found in the minority opinion in Everson v. Board of Education, 133 N. J. L. 350, 357, 44 A. 2d 333, 339 (1945); see also Johnson and Yost, Separation of Church and State in the United States (1948), where many state cases on analogous points are cited and discussed.

54. Everson v. Board of Education, 330 U. S. 1, 7 (1947).

55. 301 U. S. 495, 518 (1936).

56. 293 U. S. 245 (1934).

57. Minerville, School District v. Gobitis, 310 U. S. 586 (1940), and West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943).

preme court was affirmed. The Court, speaking by Justice Butler, recognized more specifically than had been done in previous cases that the liberty protected by the "due process" clause of the Fourteenth Amendment includes "the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training."[58] This, however, did not exempt them from the order so long as they chose to accept the privileges of the University. Justice Cardozo wrote a separate opinion (Brandeis and Stone, J. J. joining) wherein he reached the same conclusion by a slightly different route, laying stress on the light thrown upon the question by "a century and a half of history during days of peace and war."[59] Of the *Flag Salute* cases, the first, the *Gobitis* case, was expressly overruled by the *Barnette* case, and need not be discussed here. In *Barnette* Justices Roberts and Reed adhered to their views expressed in *Gobitis,* and Justice Frankfurter presented a vigorous and elaborate dissenting opinion. The salute to the flag required of pupils by the public school authorities was claimed to violate religious convictions protected by the First and Fourteenth Amendments. The prevailing opinion by Justice Jackson sustained the refusal to salute under the "free speech" clause of the First Amendment as incorporated in the Fourteenth Amendment. Justices Black and Douglas, jointly, and Justice Murphy filed opinions concurring in the result, but putting emphasis on the fact that the refusal was on religious grounds.

After reading Justice Jackson's dissenting opinion in *U. S. v. Ballard*[60] (which is cordially recommended to those who relish a good bit of caustic humor), it is rather hard to take the case seriously as a precedent in interpreting the First Amendment. And yet the majority really did present an interpretation. Without detailed analysis of the case it will suffice to say that it was a criminal prosecution for using the mails to defraud by means of false representations by members of the "I Am" cult, as to experiences claimed to be of a religious nature. The controversy, in so far as this study is concerned, was as to the propriety of the trial judge's charge in withdrawing from the jury the issue of truth of the representations made, and submitting only the question of the sincerity of defendants' belief that they were true. The Court approved the charge on this point, but on other grounds

58. 293 U. S. 245, 262 (1934).
59. 293 U. S. 245, 266 (1934).
60. 322 U. S. 78 (1944).

remanded the case for further proceedings. Chief Justice Stone and Justices Roberts and Frankfurter were for reversing the order of the Circuit Court of Appeals for a new trial and reinstating the conviction in the District Court, viewing the truth or falsity of the representations as immaterial. The majority opinion by Justice Douglas seems to hold that the First Amendment precludes judicial inquiry into the truth of a religious belief, however heretical or even fantastic it may seem to be. Justice Jackson's dissent may well be left to speak for itself.[61]

Beginning with *Lovell v. City of Griffin*,[62] 1938, there have been before the Supreme Court a great number of cases involving the religious sect calling themselves Jehovah's Witnesses. With indefatigable (many would say fanatical) zeal and persistence they have insisted upon the propagation of their peculiar faith by activities in public places and on private premises which have often met with extreme popular hostility and have resulted in prosecution under state laws and municipal ordinances. When thus called to account they have appealed to courts of the governments to which as a part of their religious beliefs (doubtless sincere) they refuse participation as citizens. Nevertheless in pursuing what they claim to be their constitutional rights they have not stopped short of our court of last resort, where these claims have received meticulously careful consideration. Most of these cases have involved the validity of state laws and local ordinances enacted as police regulations, and the question before the Court has been their "reasonableness" under the "due process" clause of the Fourteenth Amendment. The great variety of situations with which the Court has dealt, and the caution with which it has limited its decisions to the facts before it, make it difficult to present general deductions; but it may be confidently stated that free speech and religious liberty

61. The *Ballard* case was again before the Court in 329 U. S. 187 (1946), and Justice Frankfurter (Vinson, C. J., and Jackson and Burton, J. J., concurring) filed a dissenting opinion sharply criticizing the majority for ignoring the constitutional question which the minority deemed to be involved.

In view of the overruling of U. S. v. Mackintosh, 283 U. S. 605 (1931), U. S. v. Bland, 283 U. S. 636 (1931), and U. S. v. Schwimmer, 279 U. S. 644 (1929), by Girouard v. U. S., 328 U. S. 61 (1946), *In re* Summers, 325 U. S. 561 (1945), is not included in this study. In *Girouard* the Court, by Justice Douglas, expressly adopted the views of Justice Holmes and Chief Justice Hughes in their famous dissents in the Schwimmer and Mackintosh cases, respectively; Chief Justice Stone dissented in an opinion concurred in by Justices Reed and Frankfurter, while Justice Jackson did not sit in the case. All of these cases were decided on issues of statutory construction rather than (directly) constitutional interpretation.

62. 303 U. S. 444 (1938).

have become more definitely and more liberally recognized in the settled "law of the land" than they were before 1938. There is no longer any doubt that the Fourteenth Amendment guarantees against state encroachment all the civil and religious rights which are protected by the first four prohibitions of the First Amendment from violation by Congress, and the traditional presumption in favor of the "reasonableness" of legislation in this field has grown less and less conclusive. Indeed, one may surmise that the frank adoption of Justice Murphy's view, that when religious liberty is curtailed the burden shifts, may be just around the corner. Of course when "reasonableness" is the test the individuality of the judge is an important factor; and it is not surprising that dissents and qualified concurrences have greatly multiplied, and that changes in the membership of the Court have been followed by some reversals of former majorities.[63]

Discussion of the *Everson*[64] and *McCollum*[65] decisions still goes on in the press, assemblies of deeply interested persons and state courts. In each case the facts held by the Court to be determinative were uncontroverted, and in each an important point of present dispute is the degree to which the decision ought to be regarded as limited to the precise facts involved. The significant facts in the *Everson* case were as follows: A New Jersey statute authorized district boards of education to make rules and contracts for the transportation of children to and from schools other than private schools operated for profit. A board of education by resolution authorized the reimbursement of parents for fares paid for the transportation by public carrier of children attending public and Catholic schools. The Catholic schools operated under the superintendency of a Catholic priest and, in addition to secular education, gave religious instruction in the Catholic faith. A district taxpayer challenged the validity under the Federal Constitution of the statute and resolution, so far as they authorized reimbursement to parents for the transportation of children attending sectarian schools. No question was raised as to whether the exclusion of private schools operated for profit denied equal protection of the laws; nor did

63. A study of the Jehovah Witnesses cases down to Follett v. Town of McCormick, 321 U. S. 573 (1944), may be found in Waite, *The Debt of Constitutional Law to Jehovah's Witnesses*, 28 Minn. L. Rev. 209 (1944). Later cases are Marsh v. Alabama, 326 U. S. 501 (1946); Tucker v. Texas, 326 U. S. 519 (1946); and Saia v. New York, 334 U. S. 558 (1948). See also Barnett, *Mr. Justice Murphy, Civil Liberties and the Holmes Tradition*, 32 Corn. L. Q. 177 (1946).

64. Everson v. Board of Education, 330 U. S. 1 (1947).

65. People of Illinois *ex rel.* McCollum v. Board of Education, 333 U. S. 203 (1948).

the record show that there were any children in the district who attended or would have attended, but for the cost of transportation, any but public or Catholic schools. The Court held that the expenditure of tax-raised funds thus authorized was for a public purpose, and did not violate the due process clause of the Fourteenth Amendment, and that the statute and resolution did not violate the provision of the First Amendment (made applicable to the states by the Fourteenth Amendment) prohibiting any law respecting an establishment of religion.

The majority opinion was written by Justice Black. He discussed two grounds of attack upon the statute and resolution in question,—(1) under the "due process" clause of the Fourteenth Amendment, as authorizing the taking by taxation of private property to be used for private purposes; and (2) as taxation to help maintain sectarian schools contrary to the first prohibition of the First Amendment. It was recognized that these two grounds of attack "to some extent overlap." As to the first ground it is said that "the New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools. The New Jersey Court of Errors and Appeals has reached the same conclusion. The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need. It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. . . . But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution."[66] A public purpose being thus recognized, the measures taken to facilitate the transportation of school children are rather summarily found to be in aid of that purpose. Here the *Cochran*[67] case at once comes to mind as the nearest approach to a precedent; but though it was relied on in all the briefs filed for affirmance it is not cited by the Court except in support of the rather trite statement that "it is much too late to argue that legislation intended to facilitate the opportunity of children to get a *secular* (italics supplied) education serves no public purpose."[68]

In discussing the second ground of attack the Court says:

66. 330 U. S. 1, 6 (1947).
67. Cochran v. State Board of Education, 281 U. S. 370 (1930).
68. 330 U. S. 1, 7 (1947).

"Whether this New Jersey law is one 'respecting the establishment of religion' requires an understanding of that language, particularly with respect to the imposition of taxes. Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted." After such a review:

"The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth. [Citing the *Terrett, Watson, Davis, Reynolds,* and *Quick Bear* cases, *supra.*] The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause. The interrelation of these complementary clauses was well summarized in a statement of the Court of Appeals of South Carolina, quoted with approval by this Court in *Watson v. Jones,* 13 Wall. 679, 730: 'The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.' "[69] . . . [The State of New Jersey] "cannot exclude individual Catholics" etc., "or members of any other faith, *because of their faith or lack of it,* from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful in protecting the citizens of New Jersey against state-established churches to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all citizens without regard to their religious belief. Measured by these standards, we cannot say the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools."[70]

Is not this language, on the whole, more suggestive of the position already taken by the Court in the *Meyers, Bartels, Pierce* and *Cochran* decisions than of a *de novo* interpretation of the prohibition of laws "respecting an establishment of religion"?

The opinion concludes as follows: "The First Amendment has

69. 330 U. S. 1, 14, 15 (1947).
70. 330 U. S. 1, 16, 17 (1947).

erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."[71] Justices Jackson and Rutledge wrote dissenting opinions, Justice Frankfurter joining in both and Justices Jackson and Burton in the latter. Contrary to the course pursued in the *Cochran* case the Court discussed the facts and came to an independent conclusion that the New Jersey court was correct in holding that the legislation in question was in pursuance of a public purpose. The writer suggests that the more carefully one studies the complete discussion of the "overlapping" grounds of attack in the three opinions, the more clear it becomes that this was the focal point, the net result being a holding that, the purpose being public—i.e., promotive of the general welfare and not discriminatory—incidental assistance to religious schools did not bring the situation within the prohibitions of the Constitution.

In the *McCollum*[72] case, however, direct and purposeful aid to religion, though without discrimination or appreciable public expense, was found by the Court. Here the unanimous decision of the Supreme Court of Illinois was overruled. The facts can be succinctly stated as follows: A board of education, exercising its general supervisory powers over the use of public school buildings, permitted religious teachers employed, subject to the approval and supervision of the superintendent of schools, by a private religious group including representatives of the Catholic, Protestant and Jewish faiths, to give religious instruction in public school buildings once each week. Pupils whose parents so requested were excused from their secular classes during the periods of religious instruction and were required to attend the religious classes; but other pupils were not released from their public school duties, which were compulsory under state law. A resident and taxpayer of the school district whose child was enrolled in the public schools sued in a state court for a writ of mandamus requiring the board of education to terminate this practice. The Court's conclusion, announced in a brief opinion by Justice Black, was that such utilization of the State's tax-supported public school system and its machinery for compulsory public school attendance to enable sectarian groups to give religious instruction to public school pupils in public school buildings violated the First Amendment of the Constitution, made applicable to the states by the Fourteenth Amend-

71. 330 U. S. 1, 18 (1947).

72. People *ex rel.* McCollum, v. Board of Education, 396 Ill. 14, 71 N. E. 2d 161 (1947).

ment. This conclusion was held to be in line with and required by the *Everson* decision. No other case was cited as a precedent, and the Court said:

"Recognizing that the Illinois program is barred by the First and Fourteenth Amendments if we adhere to the views expressed both by the majority and the minority in the *Everson* case, counsel for the respondents challenge those views as dicta and urge that we reconsider and repudiate them. They argue that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial government assistance to all religions. In addition they ask that we distinguish or overrule our holding in the *Everson* case that the Fourteeth Amendment made the 'establishment of religion' clause of the First Amendment applicable as a prohibition against the States. After giving full consideration to the arguments presented we are unable to accept either of these contentions."[73]

Justice Frankfurter presented an independent opinion, much of which might have been prepared as a dissent in *Everson*, with a review of the origin and spread of the "released time" plan for religious education. Justices Jackson, Rutledge and Burton joined in this, and Justice Jackson, in what is termed a "concurring" opinion, reflected important differences of view both as to facts and law. Justice Reed wrote a vigorous dissent. We quote only its concluding sentences:

"This Court cannot be too cautious in upsetting practices embedded in our society by many years of experience. A state is entitled to have great leeway in its legislation when dealing with the important social problems of its population. A definite violation of legislative limits must be established. The Constitution should not be stretched to forbid national customs in the way courts act to reach arrangements to avoid federal taxation. Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people."[74]

While the *McCollum* decision relies in part on the fact that religious instruction was given in the school building, it is a fair inference from the language of the majority opinion that the conclusion would have been the same if this fact had been otherwise; and such seems to have been the view of the other members of the Court who wrote opinions.[75]

73. 333 U. S. 203, 211 (1948).
74. 333 U. S. 203, 256 (1948).
75. The final order entered in the Illinois court where the action originated was as follows: "It is hereby ordered (1) that the Board of Education of Community Unit School District No. 4, Champaign County, Illinois, immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in the manner heretofore conducted

Is it not a fair summary of the two cases to say that, taking them together, while all the members of the Court agreed that either purposeful or discriminatory aid to religion, through legislation by a state, is prohibited by the 1st and 14th Amendments, five held that the facts in the *Everson* case did not constitute such aid, while four thought otherwise; and that on the facts in the *McCollum* case the conclusion was eight to one in the affirmative? Justice Reed seems to go further, having in mind a definition of "religion" like that adopted in the *Davis*[76] case, and holding the view that even purposeful aid to the general cause of religion, without compulsion, discrimination or diversion of public funds, is not within the interpretation of the First Amendment to which he had agreed in the *Everson* case. Did he perhaps recall the words of Justice Story, in the first case involving religion which came before the new Court, that "The free exercise of religion cannot be justly deemed restrained by aiding with equal attention the votaries of every sect to perform their own religious duties"?[77]

In view of the long-established policy of the Court to avoid unnecessary interpretation of the Constitution, it is somewhat surprising to find in the opinions in both cases the following statement of what all agree upon as to the meaning of the "establishment of religion" prohibition in the First Amendment:

1. "Neither a state nor the Federal Government can set up a church.
2. "Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.
3. "Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.
4. "No person can be punished for entertaining or for professing religious beliefs or disbeliefs, for church attendance or non-attendance.
5. "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they

by said School District Number 71, in all public schools within the original School District Number 71, Champaign County, Illinois, and in all public school houses and buildings in said district when occupied by public schools; and

(2) to prohibit within said original School District No. 71 the use of the state's public school machinery to help enroll pupils in the several religious classes of sectarian groups."

76. Davis v. Beason, 133 U. S. 333 (1889); see p. 498, *supra.*

77. Terrett v. Taylor, 9 Cranch. 43, 48 (1815).

may be called, or whatever form they may adopt to teach or practice religion.

6. "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa."[78]

Of these pronouncements Nos. 1, 3 and 4 cover matters that have not been before the Court; and it does not seem probable that they will ever come up for decision. The others cover general principles, each so stated as to be subject to discriminatory interpretation according to the facts in the particular case, viewed from diverse individual standpoints, and in each instance fairly open to the claim of such construction as to contravene existing practices of the states and the Federal Government which have not yet been questioned in the Supreme Court.

From its adoption until the ratification of the Fourteenth Amendment in 1868 the Federal Constitution provided no curb upon the attitude of the several states toward the establishment of religion or restrictions upon religious liberty; and it was not until long afterward that the Supreme Court began to recognize its "due process" clause as including rights guaranteed by the First. The *Everson* and *McCollum* cases are the first to be decided under an express declaration that this inclusion extends to the prohibition of state legislation "respecting an establishment of religion." It is therefore natural that the factual situations found in *Everson* and *McCollum* should exist, with variations, in other states, and should be responsive to state laws differing according to local conditions. This fact, together with the vagueness of the phrase "respecting an establishment of religion," and the diversity and intensity of the views of interested groups, suggests that we may have here a source of Constitutional litigation quite as prolific as the erratic zeal of Jehovah's Witnesses has been. The fact that this study has developed no clear precedent for the *Everson* and *McCollum* decisions seems important; while the points actually decided in the earlier cases, and the quoted comments of the Court, may provide an atmosphere favorable to the evaluation of the two most recent decisions, which together provide a starting point for exploration of a new field. It seems obvious that they do not go far toward furnishing a final interpretation of so elastic a phrase as

78. This statement is found in Justice Black's opinion of the majority in Everson v. Board of Education, 330 U. S. 1, 15, 16; and is quoted in his opinion in State *ex rel.* McCollum v. Board of Education, 333 U. S. 203, 210, 211.

"respecting an establishment of religion." In the relations of our state and national governments to religion, organized and unorganized, much remains to be determined.

All will agree that the object sought in the first two prohibitions of the First Amendment was to declare and protect the principle of religious liberty. After nearly a century and a half the scope of the second seems pretty well established,—and it has become very broad. If the first, now coming to the fore, is to be applied with due regard to existing conditions and the spirit of the times, must not the Court adopt a more positive and forward-looking attitude than it has yet taken? Is such an attitude disclosed by emphasis upon "a wall of separation between church and state"? Do not the concept of religious liberty and the distinction between religion and a religious *cultus*,—i.e. a sect or organized church,—made long ago in *Davis v. Beason*,[79] suggest sounder bases of interpretation?[80]

Jefferson's phrase was a shout of triumph after a winning fight against new-world remnants of old-world ecclesiasticism. In *Cantwell v. Connecticut*[81] we find a summary of that great victory in words more likely to be useful under twentieth century conditions: "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion."[82]

79. 133 U. S. 333 (1889).

80. The case of Pierce v. Society of Sisters of Holy Names, 288 U. S. 510 (1925), discussed at p. 000, *supra*, was not decided by reference to the First Amendment; but fundamental to that decision is the concept of religious liberty—that of Catholic parents to choose religious schools for their children in the face of a compulsory education law enacted to require attendance of all children at public, non-religious schools

81. 310 U. S. 296 (1940).

82. *Id.* at 303; Justice Roberts for the unanimous Court.